Nos. 17-1717, 18-18

In the Supreme Court of the United States

AMERICAN LEGION, *et al.*,

Petitioners,

v.

AMERICAN HUMANIST ASSOCIATION, *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

Brief of Religious and Civil-Rights Organizations as *Amici Curiae* in Support of Respondents

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BRIEF OF RELIGIOUS AND CIVIL-RIGHTS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTERESTS OF THE *AMICI CURIAE*

Amici are religious and civil-rights organizations whose members include adherents to a wide array of faiths and beliefs that have historically been subjected to religious discrimination and official disfavor. Our differing belief systems notwithstanding, *amici* are united in respecting the important but distinct roles of religion and government in the life of our Nation. From the time of the founding, the Establishment Clause and the religious and philosophical ideals on which it is premised have protected religious freedom for all Americans by ensuring that government does not interfere in private matters of conscience.[1]

A governmental display of a Latin cross as a memorial to veterans is deeply hurtful and exclusionary to the countless non-Christians who have died in service to our Nation. *Amici* have strong interests in ensuring that equal sacrifices by our fellow citizens are treated with equal regard and that this Court's jurisprudence remains true to the fundamental principles on which the Religion Clauses of the First Amendment are based.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici*, their members, or their counsel made a monetary contribution to fund the brief's preparation or submission. The parties' letters consenting to the filing of *amicus* briefs are on file with the Clerk.

The *amici* are:

- Americans United for Separation of Church and State.
- American Civil Liberties Union.
- American Civil Liberties Union of Maryland.
- Anti-Defamation League.
- Hadassah, the Women's Zionist Organization of America, Inc.
- Hindu American Foundation.
- Interfaith Alliance Foundation.
- Jewish Social Policy Action Network.
- Men of Reform Judaism.
- National Council of Jewish Women.
- People for the American Way Foundation.
- Reconstructing Judaism.
- Reconstructionist Rabbinical Association.
- Union for Reform Judaism.
- Women of Reform Judaism.

Individual descriptions of the *amici* appear in the Appendix.

INTRODUCTION AND SUMMARY OF ARGUMENT

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson* v. *Valente*, 456 U.S. 228, 244 (1982); accord, *e.g.*, *McCreary County* v. *ACLU of Ky.*, 545 U.S. 844, 860 (2005) (government must remain "neutral[] between religion and

religion, and between religion and nonreligion" (quoting *Epperson* v. *Arkansas*, 393 U.S. 97, 104 (1968)).

By ordaining that governmental and religious authorities operate in separate spheres, the Framers sought to safeguard religion from governmental influence and interference, so that all may worship and pray, or not, according to the dictates of individual conscience. And they undertook to quell the "hatred, disrespect, and even contempt" that historically has resulted "whenever government ha[s] allied itself with one particular form of religion." *Engel* v. *Vitale*, 370 U.S. 421, 431 (1962). The First Amendment thus disallows official religious favoritism, no matter how modest or how benign in intent.

"The cross is of course the preeminent symbol of Christianity." *Salazar* v. *Buono*, 559 U.S. 700, 725 (2010) (Alito, J., concurring in part and concurring in the judgment). For some Christians, contemplating a government-sponsored symbol of their faith may be a profoundly affirming experience. But for those who do not subscribe to Christian beliefs, being confronted with an official display of a Latin cross may be a profound experience in a quite different way.

For members of minority faiths, the towering Latin cross here conveys a strong message of exclusion and secondary status, whatever the counties' intent. It announces that Bladensburg is a Christian polity, where Christians "are insiders, favored members of the political community," and all others "are outsiders." *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 309-310 (2000) (quoting *Lynch* v. *Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)). And the harm is all the greater because the counties proclaim

the cross to be a memorial to all veterans, without regard to the countless non-Christians who fought and died for our country.

When government chooses, as it should, to honor those who have made the ultimate sacrifice for our Nation, it should recognize the equal citizenship and equal sacrifice of all. It should not favor only those who hold a preferred faith or set of beliefs.

This Court's long-standing jurisprudence, which forbids such religious favoritism, appropriately safeguards religious freedom for all. As the United States becomes increasingly religiously diverse, that constitutional protection is more crucial than ever. The Court should therefore reject any invitation to forsake our "profound commitment to religious liberty" (*McCreary*, 545 U.S. at 884) and should instead reaffirm the fundamental principles and essential protections for religious freedom that have served this country and all its people so well for so long.

ARGUMENT

"[T]he Framers of the First Amendment forbade" any "official denominational preference," mandating instead the strict "principle of denominational neutrality." *Larson*, 456 U.S. at 246, 255.[2] Petitioners ask

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[2] Accord, *e.g.*, *Lee* v. *Weisman*, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting) ("[O]ur constitutional tradition, from the Declaration of Independence and the first inaugural address of Washington * * * down to the present day, has * * * ruled out of order government-sponsored endorsement of religion * * * where the endorsement is sectarian * * *."); *Wallace* v. *Jaffree*, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting) ("The [Establishment] Clause was * * * designed to stop the Federal Government from asserting a preference for one religious denomination or sect over others.").

this Court to approve a towering Latin cross as an official monument to all veterans and fallen soldiers, without regard for the diverse faiths and beliefs of those who actually served and died for our country. Petitioner American Legion and a number of petitioners' *amici* further ask the Court to rewrite Religion Clause jurisprudence wholesale, so as to license all manner of official favoritism toward the majority faith. Both requests are inconsistent with the fundamental constitutional principles that the Framers put in place to protect religious freedom. They should be rejected.

A. The Judgment Is Consistent With The History, Purpose, And Original Understanding Of The Religion Clauses.

1. The Religion Clauses were premised on the recognition that governmental involvement with religion is a grave threat to religious freedom.

The architects of the First Amendment recognized that "Religion & Govt. will both exist in greater purity, the less they are mixed together." Letter from James Madison to Edward Livingston (July 10, 1822), http://bit.ly/2zUXhBT. This principle—that religion flourishes best when government is least involved—has deep roots in theology and political philosophy that long predate the founding of the Republic. Grounded in the belief that freedom of conscience is an essential component of faith, as well as the experience of a long, sad history of religiously based strife and oppression, the constitutional principle of separation of religion and government recognizes that governmental support for religion corrodes true belief, risks making religious denominations and houses of worship beholden to the state, and places subtle—or

not so subtle—coercive pressure on individuals and faith groups to conform.

a. The notion of freedom of conscience as a moral virtue traces to the thirteenth-century teachings of Thomas Aquinas, who wrote that conscience must be a moral guide and that acting against one's conscience constitutes sin. See Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. Rev. 346, 356-357 (2002). Martin Luther built on this idea, teaching that the Church lacks authority to bind believers' consciences on spiritual questions: "the individual himself c[an] determine the content of his conscience based on scripture and reason." *Id.* at 358-359. John Calvin developed the idea further, preaching that individual conscience absolutely deprives civil government of authority to dictate in matters of faith. See *id.* at 359-361.

These tenets found expression in the New World teachings of Roger Williams, the Baptist theologian and founder of Rhode Island. Williams preached that for religious belief to be genuine, people must come to it of their own free will. Compelled belief and punishment of dissent are anathema to true faith, and religious practices are sinful unless performed "with[] *faith* and true perswasion that they are the true institutions of God." Roger Williams, *The Bloudy Tenent of Persecution for Cause of Conscience* (1644), *reprinted in* 3 *Complete Writings of Roger Williams* 12 (Samuel L. Caldwell ed., 1963).

Thus, Williams taught, keeping government from involving itself with or taking sides in matters of religion is crucial to protect religious dissenters against persecution and to safeguard religion itself against impurity and dilution. See Williams, *The Bloudy*

Tenent, supra, at 12-13; Edwin S. Gaustad, *Roger Williams* 59 (2005); Richard P. McBrien, *Caesar's Coin: Religion and Politics in America* 248 n.37 (1987) ("[T]he Jews of the Old Testament and the Christians of the New Testament 'opened a gap in the hedge or wall of separation between the garden of the church and the wilderness of the world. * * * [I]f He will ever please to restore His garden and Paradise again, it must of necessity be walled in peculiarly unto Himself from the world.'" (quoting Williams)). When government involves itself in matters of religion, even if just to give the barest nod of approval to a particular faith or set of beliefs, the inherent coercive authority of the state impedes the exercise of free will.

b. This theology became the foundation for the political thought on which our constitutional order was built. Notably, John Locke incorporated it into his argument for religious toleration:

> Whatsoever may be doubtful in Religion, yet this at least is certain, that no Religion, which I believe not to be true, can be either true, or profitable unto me. In vain therefore do Princes compel their Subjects to come into their Church-communion, under pretence of saving their Souls. * * * [W]hen all is done, they must be left to their own Consciences.

John Locke, *A Letter Concerning Toleration* 38 (James H. Tully ed., Hackett Publ'g Co. 1983) (1689). Based on this understanding and the related concern that social division and bloodshed often follow when government takes positions on matters of faith, Locke reasoned that "civil government" should not "interfere with matters of religion except to the extent necessary to preserve civil interests." Feldman, *Intellectual Origins, supra*, at 368.

Many of our Nation's founders took these teachings to heart. Benjamin Franklin, for example, stated:

> When a Religion is good, I conceive it will support itself; and when it does not support itself, and God does not care to support [it], so that its Professors are oblig'd to call for the help of the Civil Power, 'tis a Sign, I apprehend, of its being a bad one.

Letter from Benjamin Franklin to Richard Price (Oct. 9, 1780), http://bit.ly/2jMsrVO. And James Madison viewed governmental support for religion as "[r]eligious bondage [that] shackles and debilitates the mind and unfits it for every noble enterprize." Letter from James Madison to William Bradford (Apr. 1, 1774), http:/bit.ly/2h57Xm5.

c. Madison's commitment to freedom of conscience informed his opposition to Patrick Henry's proposal in 1784 that Virginia fund religious education with property taxes. See Carl H. Esbeck, *Protestant Dissent and the Virginia Disestablishment, 1776-1786*, 7 Geo. J.L. & Pub. Pol'y 51, 77-78 (2009). Madison objected that Henry's proposal would infringe "the equal right of every citizen to the free exercise of his Religion according to the dictates of conscience," intruding on religious freedom and threatening civil governance. James Madison, *Memorial and Remonstrance Against Religious Assessments* ¶¶ 12-13, 15, *reprinted in Everson* v. *Board of Educ.*, 330 U.S. 1, 63-72 (1947) (appendix to dissent of Rutledge, J.). Governmental support for religion would only "weaken in those who profess [the benefited] Religion a pious confidence in its innate excellence," while "foster[ing] in those who still reject it, a suspicion that its friends are too conscious of its fallacies, to trust it to its own merits." *Id.* ¶ 6.

These principles led to the defeat of Henry's proposal and spurred adoption instead of Thomas Jefferson's Bill for Establishing Religious Freedom (see Merrill D. Peterson, *Jefferson and Religious Freedom*, Atlantic Monthly (Dec. 1994), http://theatln.tc/2idj7Xo), the forebear of the First Amendment's Religion Clauses (see *Everson*, 330 U.S. at 13).

2. The Framers recognized that religious pluralism and civil harmony require strict neutrality in matters of religion.

a. Though the United States was more homogeneous in 1789 than it is today, this country has, from the beginning, been home to unprecedented religious diversity. Congregationalists maintained a stronghold in New England; Anglicans dominated religious life in the South; and Quakers influenced society significantly in Pennsylvania. See Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 45 (1998); Winthrop S. Hudson, *Religion in America* 46 (3d ed. 1981).

The Framers knew that "[t]he centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy." *Everson*, 330 U.S. at 8-9. Religious pluralism thus represented not just a great national strength but also a profound threat to civil peace. And the Framers recognized separation of religion and government as the antidote to the latter.

Roger Williams, for example, had made the case against using the tools of the state to promote religion even to the slightest degree, because official religious

favoritism inevitably leads to "persecution for cause of conscience" that breaches the "express command of God that peace be kept." Williams, *The Bloudy Tenent*, *supra*, at 59, 61. And Locke, "[w]riting in the aftermath of religious turmoil in England and throughout Europe," had recognized "the tendency of both religious and governmental leaders to overstep their bounds and intermeddle in the others' province," producing civil strife. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1431-1432 (1990). Locke had argued, therefore, that separation was a prerequisite to lasting peace. *Ibid.*; see also Feldman, *Intellectual Origins*, *supra*, at 368.

The Framers thus well understood that they were creating a government for a diverse group of people and faiths (see Jon Meacham, *American Gospel: God, the Founding Fathers, and the Making of a Nation* 101 (2006)) and that religious liberty for all would necessarily require accommodation of religious pluralism (see John Witte Jr., *Religion and the American Constitutional Experiment* 45 (2d ed. 2005) (citing The Federalist Nos. 10, 51 (James Madison))). Cf. McConnell, *supra*, at 1513, 1516 (arguing that Free Exercise Clause was product of, and protection for, religious pluralism).

b. It was against this philosophical and political backdrop—including the lived experience of persecution of Baptists and other religious dissenters at the hands of the established Anglican church (see Andy G. Olree, *"Pride Ignorance and Knavery": James Madison's Formative Experiences with Religious Establishments*, 36 Harv. J.L. & Pub. Pol'y 211, 215, 226-227, 266-267 (2013))—that Virginia enacted Jefferson's

Bill for Establishing Religious Freedom, which forthrightly declared it an "impious presumption of legislators and rulers, civil as well as ecclesiastical, * * * [to] assume[] dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible, and as such endeavouring to impose them on others." Thomas Jefferson, *The Virginia Statute for Establishing Religious Freedom* (Jan. 16, 1786), *reprinted in Founding the Republic: A Documentary History* 94 (John J. Patrick ed., 1995).

Or as Madison put it, "experience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation. * * * What have been [their] fruits? More or less in all places, pride and indolence in the Clergy; ignorance and servility in the laity; in both, superstition, bigotry and persecution." Madison, *Memorial and Remonstrance* ¶ 7.

In short, the Virginia statute embodied the belief that religion neither requires nor benefits from the support of government: "truth is great and will prevail if left to herself." Jefferson, *Virginia Statute*, *supra*, at 95. And it conveyed the understanding that even modest, seemingly benign governmental favoritism influences individual religious practice and pressures clergy, houses of worship, and denominations to conform their teachings to the predilections of bureaucrats. See *id.* at 94-95 (official support in any measure "tends only to corrupt the principles of that very Religion it is meant to encourage, by bribing with a monopoly of worldly honours and emoluments, those who will externally profess and conform to it").

c. "[T]he provisions of the First Amendment, in the drafting and adoption of which Madison and Jef-

ferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute." *Everson*, 330 U.S. at 13 (citing *Reynolds* v. *United States*, 98 U.S. 145, 164 (1878); *Watson* v. *Jones*, 80 U.S. (13 Wall.) 679 (1871); *Davis* v. *Beason*, 133 U.S. 333, 342 (1890)). Jefferson and Madison's vision, premised on a commitment to robust freedom of conscience, defined the original understanding of the Establishment Clause. See, *e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171, 183-184 (2012) (identifying Madison as "the leading architect of the religion clauses"); *Arizona Christian Sch. Tuition Org.* v. *Winn*, 563 U.S. 125, 166 (2011) (same); *Walz* v. *Tax Comm'n*, 397 U.S. 664, 705-706 (1970) (same); *Flast* v. *Cohen*, 392 U.S. 83, 103 (1968) (same). "[T]he Virginia struggle for religious liberty thus became warp and woof of our constitutional tradition, not simply by the course of history, but by the common unifying force of Madison's life, thought and sponsorship." *Everson*, 330 U.S. at 39 (Rutledge, J., dissenting).

In recognition "that a union of government and religion tends to destroy government and to degrade religion" (*Engel*, 370 U.S. at 431 (1962)), "the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere" (*Illinois ex rel. McCollum* v. *Board of Educ.*, 333 U.S. 203, 212 (1948); accord Letter from James Madison to Edward Livingston, *supra*). The Establishment Clause embodies Madison and Jefferson's "plan of preserving religious liberty to the fullest extent possible in a pluralistic society." *McCreary*, 545 U.S. at 882 (O'Connor, J., concurring). It "stands as an expression of principle on the part of the Founders of

our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate" (*Engel*, 370 U.S. at 432)—perversion that occurs when a faith is favored as much as when one is disfavored (see *Lee v. Weisman*, 505 U.S. 577, 608 (1992) (Blackmun, J., concurring) ("The favored religion may be compromised as political figures reshape the religion's beliefs for their own purposes; it may be reformed as government largesse brings government regulation.")).

d. The Framers intended not only to protect "the freedom of the individual to worship in his own way," but also to guard against "anguish, hardship and bitter strife that could come when zealous religious groups struggled with one another to obtain the Government's stamp of approval." *Engel*, 370 U.S. at 429.

Hence, the Religion Clauses were designed to "'assure the fullest possible scope of religious liberty and tolerance for all,'" which was understood to be the only way "to avoid that divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike." *Van Orden* v. *Perry*, 545 U.S. 677, 698 (2005) (Breyer, J., concurring).

As our Nation becomes increasingly religiously diverse, the dangers of division become more serious, not less. And hence, the antidote that the Framers prescribed—the safeguarding of the fundamental freedom for all to believe and worship, or not, according the dictates of conscience, without influence or interference from government—becomes ever more important.

B. The Counties' Cross Display Intrudes On Religious Freedom.

1. The Latin cross is an unmistakable and potent symbol of Christianity.

a. Symbols have power. They communicate complex ideas, often more effectively and more forcefully than mere words. "The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind." *West Va. Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 632 (1943). Symbols "attract public notice, they are remembered for decades or even centuries afterwards," and they "speak[] directly to the heart" as well as the head. Nicholas Jackson O'Shaughnessy, *Politics and Propaganda* 102 (2004). That is why "[c]auses and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design." *Barnette*, 319 U.S. at 632; cf. *Texas* v. *Johnson*, 491 U.S. 397, 405 (1989) ("Pregnant with expressive content, the flag as readily signifies this Nation as does the combination of letters found in 'America.'").

What is true for symbols generally is especially so for religious ones, which may convey at a glance millennia of collective experience, hope, and triumph to those who hold them dear—and at times the opposite messages to those who do not.

b. Perhaps no symbol is more universally familiar, or more laden with meaning, than the Latin cross. See, *e.g.*, Alister E. McGrath, *Christianity: An Introduction* 256-257 (3d ed. 2015). Since the earliest days of Christianity, "[t]he cross has been the universally acknowledged symbol of the Christian faith." *Id.* at 256.

It achieved special prominence beginning in the fourth century, when the Roman Emperor Constantine adopted Christianity for the Empire (Bruce W. Longenecker, *The Cross Before Constantine: The Early Life of a Christian Symbol* 2-5, 11 (2015)) and began using the cross "as protection against the attacks of the enemy" (Eusebius, *Life of Constantine* 1:29 (Averil Cameron & Stuart G. Hall trans. 1999) (early Church historian's description of Constantine's vision and dream leading to use of cross)).

The cross has been consistently and unequivocally associated with Christianity ever since. See McGrath, *supra*, at 256. It was the primary symbol used during the Crusades to distinguish the crusaders from opposing forces. See Jonathan Riley-Smith, *The Crusades: A History* 16 (2d ed. 2005). And it was vitally important to Medieval and Renaissance art, when "the painted picture was invaluable as an interpreter and exponent of religious truths," because the cross visually communicated the Church's message of redemption. George Willard Benson, *The Cross: Its History and Symbolism* 121, 136 (1934). Thus, countless portrayals of Jesus' death included the cross, not just as representational art, but to disseminate Church doctrine. See McGrath, *supra*, at 257. For similar reasons, crosses have historically adorned and been design elements for churches, inside and out. See Richard Taylor, *How to Read a Church: A Guide to Symbols and Images in Churches and Cathedrals* 39 (2003).

Pope Francis has explained: "The Christian Cross is not something to hang in the house 'to tie the room together' * * * or an ornament to wear, but a call to that love, with which Jesus sacrificed Himself to save humanity from sin and evil." *Pope Francis: The Cross*

Is the Gate of Salvation, Catholic News (Mar. 12, 2017), http://bit.ly/2CLyEqE; cf. U.S. Conference of Catholic Bishops, *Built of Living Stones: Art, Architecture, and Worship* § 91 (2000) ("[T]he image of Christ crucified * * * makes tangible our belief that our suffering when united with the passion and death of Christ leads to redemption.").

In short, the cross is not merely *a* symbol of Christianity; it is *the* symbol. See McGrath, *supra*, at 256; Douglas Keister, *Stories in Stone: A Field Guide to Cemetery Symbolism and Iconography* 172 (2004); see also *Salazar*, 559 U.S. at 725 (2010) (Alito, J., concurring in part and concurring in the judgment) ("The cross is of course the preeminent symbol of Christianity."). It is a "pure religious object" (Frank S. Ravitch, *Religious Objects as Legal Subjects*, 40 Wake Forest L. Rev. 1011, 1023-1024 (2005)) that serves as the physical embodiment of Christian tenets of resurrection and redemption.

2. The counties' cross display constitutes official religious favoritism.

a. As the court of appeals recognized, the invocation of Jesus' death and Christian doctrine is precisely why crosses are used to honor the dead—Christian dead. See American Legion Pet. App. 18a ("[T]he Latin cross * * * only holds value as a symbol of death and resurrection because of its affiliation with the crucifixion of Jesus Christ."); accord, *e.g.*, *American Atheists, Inc.* v. *Duncan*, 616 F.3d 1145, 1159-1160 (10th Cir. 2010). "All the secondary meanings to which the cross has been put are derived from, and dependent on," its primary message "that the son of God died on the cross to redeem the sins of humankind, that he rose from the dead, and that those who believe in him will also rise from the dead and have eternal life."

Douglas Laycock, *Government-Sponsored Religious Displays: Transparent Rationalizations and Expedient Post-Modernism*, 61 Case W. Res. L. Rev. 1211, 1239 (2011).

b. It is therefore entirely understandable that private citizens in Prince George's County and then the American Legion, also a private group, chose to erect a Latin cross. For them, the cross, with its deep layers of spiritual meaning, served two distinct but mutually reinforcing ends: It allowed them to commemorate the life, death, honor, and sacrifice of soldiers presumed to be Christian. And it simultaneously provided a vehicle to honor the group members' own faith and to pledge themselves collectively to a spiritual path that they regarded as righteous.

Thus, the original organizers required donors to declare the existence of "ONE GOD" and pledge to follow the "SPIRIT" of the fallen soldiers to "GUIDE US THROUGH LIFE IN THE WAY OF GODLINESS, JUSTICE AND LIBERTY." J.A. 36. And in the hands of the American Legion, the cross was dedicated in a ceremony replete with Christian prayers led by Christian clergy. J.A. 1130.

In short, the Bladensburg Cross has, since its inception, been a monument to the Christian faith as much as to the 49 listed individuals.

c. No one disputes that these private groups had the right to use the Latin cross as a tribute to their own faith and to Christian dead. The question here is whether Montgomery and Prince George's Counties were permitted to make that same choice when they acquired the cross in 1961 (J.A. 91), rededicated it in 1985 to all veterans (J.A. 1271-1278, 1281), and maintained it as an official tribute to all veterans ever

since. The answer to that question is a resounding "no" under settled legal doctrine, for the reasons that the court of appeals explained. The result is also the right one given the fundamental principles on which the Framers built the First Amendment's protections for religious freedom.

In World War I, and in all wars before and since, people of many faiths, and people of no particular faith, fought and died for our country. The Christian lives lost are deserving of respect, gratitude, and remembrance. But they are not *more* worthy than the lives, deaths, and sacrifices of the many non-Christians who served beside them.

Yet that is precisely the message that the counties have sent, intentionally or not, by adopting, dedicating, and maintaining a towering Latin cross as their official tribute to veterans and war dead. "[A] memorial Cross is not a *generic* symbol of death; it is a *Christian* symbol of death that signifies or memorializes the death of a *Christian*." *Duncan*, 616 F.3d at 1161 (emphasis in original). Hence, "the use of exclusively Christian symbolism in a memorial would * * * 'lead observers to believe that the [government] has chosen to honor only Christian veterans.'" *Trunk* v. *City of San Diego*, 629 F.3d 1099, 1112 (9th Cir. 2011) (quoting *Separation of Church & State Comm.* v. *City of Eugene*, 93 F.3d 617, 626 (9th Cir. 1996) (O'Scannlain, J., concurring)).

By displaying the preeminent symbol of Christianity, the counties have conveyed the exclusionary message that Bladensburg is a Christian community in which those who don't share the Christian faith simply do not belong. They have declared who matters; who is a "real" American; who is one of "us." And who isn't.

The harm of that message is more than theoretical: Empirical research confirms that religious symbols have real, measurable effects on adherents and nonadherents alike, even when the symbols are displayed with no intent to proselytize or coerce. Viewing religious symbols, for example, has statistically significant effects on students' academic performance. Researchers found in controlled experiments that Catholic-school students did systematically better on standardized tests when the examiner wore a cross and systematically worse when the examiner wore a Star of David. See Philip A. Saigh, *Religious Symbols and the WISC-R Performance of Roman Catholic Junior High School Students*, 147 J. Genetic Psychol. 417, 417-418 (1986). And both Christian and Muslim students scored better than expected when the examiner wore a symbol of their faith and worse than expected when the examiner wore a symbol of the other faith. Philip A. Saigh, *The Effect of Perceived Examiner Religion on the Digit Span Performance of Lebanese Elementary Schoolchildren*, 109 J. Soc. Psychol. 167, 168-170 (1979).

These effects are not limited to children. Research has also revealed that exposure to religious symbols that adult test subjects viewed as negative (such as an inverted pentagram) suppressed brain activity, while exposure to religious symbols that the subjects regarded as positive (such as a dove) had no deleterious effects. See Kyle D. Johnson et al., *Pilot Study of the Effect of Religious Symbols on Brain Function: Association with Measures of Religiosity*, 1 Spirituality in Clinical Practice 82, 82, 84 (2014), http://bit.ly/2ifUo4M.

d. The counties contend, however, that the Bladensburg cross is not exclusionary because it has

always been "understood * * * as a memorial to veterans and the fallen of every faith." Counties' Cert. Reply Br. 4. But employing the preeminent symbol of Christianity to represent all veterans disregards non-Christian veterans' and their families' actual faiths and beliefs, imposing on them all the deep theological commitments of the Latin cross.

The counties' contention is also irreconcilable with the facts on the ground, both when the private monument was planned and today. "More than 3,500 Jewish soldiers gave their lives for the United States in World War I." *Salazar*, 559 U.S. at 726 (Alito, J., concurring in part and concurring in the judgment). So while it is certainly true that ranks of overseas graves from that war bear headstones in the form of white crosses, the headstones of Jewish soldiers are instead white Stars of David. *Ibid.* And when, around the end of World War I (and the private groups' commencement of the Bladensburg Cross project), the United States first began officially allowing religious symbols on military headstones, it likewise did not impose crosses on Jewish soldiers but instead authorized the use of Stars of David. See Sara Amy Leach, *World War I Veterans and Their Federal Burial Benefits*, 41:4 AGS Q.: Bull. Ass'n for Gravestone Studies 36, 36-37 (2017), https://bit.ly/2CdBu7w.

Today, given the amazing diversity of faiths in the nation and its armed forces, the United States Department of Veterans Affairs appropriately makes available for use on government-furnished headstones more than 70 "emblems of belief"—including many different types of crosses, the Jewish Star of David, the Hindu Om, the Baha'i nine-pointed star, the Muslim crescent and star, the Druid Awen, the Sikh Khanda, the Bud-

dhist Wheel of Righteousness, several Native American religious symbols, the Wiccan pentacle, and an atomic whirl for atheists. See *Available Emblems of Belief for Placement on Government Headstones and Markers*, U.S. Dep't of Veterans Affairs, Nat'l Cemetery Admin., https://bit.ly/2ydVtE3. And the Department provides a relatively simple mechanism for adding other religious symbols, so that no family is subjected to the indignity and spiritual harm of having the government bury a loved one under a religious symbol that does not reflect, and may be contrary to, the family's faith. See 38 C.F.R. 632. No one religious symbol is used to honor and represent all servicemembers because no one religious symbol *can* represent them all.

America's fallen soldiers and the sacrifices that they and their families have made are all worthy of remembrance and recognition. Rather than commemorate only Christian soldiers through a misguided use of the cross, government ought to acknowledge the equal worth, equal dignity, and equal sacrifice of all who gave their lives in service to our Nation.

e. What is more, many people who see the Bladensburg Cross today will simply have no idea that it was a war memorial, whether to the 49 listed individuals or to all veterans. But they certainly understand it to be government-sponsored. Sandwiched between busy thoroughfares on public land, its inscription obscured by hedges, most who pass by see only a towering, lighted symbol of Christianity proclaiming the religious identity of the community.

To many—including the Jews, Muslims, Hindus, Sikhs, Buddhists, nonbelievers, and others who live in Maryland—this prominent official display does precisely what the counties here deny: It communicates a

strong message of preference for Christians and exclusion and second-class status for non-Christians. That message is not just wrong but dangerous, for "nothing does a better job of roiling society" than "when the government weighs in on one side of religious debate." *McCreary*, 545 U.S. at 876.

* * *

The Establishment Clause mandates that "religious belief is irrelevant to every citizen's standing in the political community." *Lee*, 505 U.S. at 627 (Souter, J., concurring). And it recognizes that "[v]oluntary religious belief and expression may be as threatened when government takes the mantle of religion upon itself as when government directly interferes with private religious practices." *McCreary*, 545 U.S. at 883 (O'Connor, J., concurring). The counties' cross display cannot be squared with those precepts or with the essential protections for freedom of conscience that they embody. It is a massive concrete thumb on the scale in favor of a preferred set of religious beliefs, improperly and harmfully defining political in- and outgroups.

C. The Legal Tests Advocated By Those Seeking To Uphold The Official Cross Display Fall Far Short Of The Original Guarantees Of The First Amendment.

Petitioner American Legion and many of petitioners' *amici* argue not just that the counties' towering Latin cross should be preserved, but also that the Court should use this occasion to rewrite long-standing, well-settled First Amendment jurisprudence to sanction all sorts of denominational favoritism and governmental support for religion.

Some contend that the Establishment Clause should bar only formal legal coercion—such as fines or imprisonment for failure to participate in official religious exercises. See, *e.g.*, American Legion Br. 24-40; U.S. *Amicus* Br. 13-23; Cato Institute *Amicus* Br. 8-9. Others proffer what they describe as a historical approach, under which any governmental promotion of religion that might have occurred anywhere when the First Amendment was adopted ought to be treated as constitutionally licensed—or, even more aggressively, that any acts that the Framers did not specifically identify as barred are therefore permitted. See, *e.g.*, Liberty Counsel *Amicus* Br. 39-42; Utah Highway Patrol Ass'n *Amicus* Br. 6-22. Still others suggest that governmental sponsorship of religion should be constitutionally permissible merely because it has been occurring for a long time without precipitating a legal challenge or public outcry. See, *e.g.*, West Virginia *Amicus* Br. 2-3, 7-10.

None of these alternatives is consistent with the Framers' fundamental commitment to religious freedom for all.

1. *A narrow focus on legal coercion would allow official favoritism to degrade religious freedom and render the Establishment Clause superfluous.*

a. A test that reinterpreted the Establishment Clause to bar only formal legal coercion cannot be squared with the "clearest command * * * that one religious denomination cannot be officially preferred

over another" (*Larson*, 456 U.S. at 244),[3] or the animating principle that favoritism corrupts religion and compromises religious freedom (see Section A., *supra*).

As this Court has explained, the Establishment Clause was meant to recognize that when government acts as a "mouthpiece for competing religious ideas" (*McCreary*, 545 U.S. at 883) it distorts and degrades religion and infringes religious freedom. Thus, "the government must not align itself with any [religion]" but instead should "'make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary.'" *Lee*, 505 U.S. at 608 (Blackmun, J., concurring) (quoting *Zorach* v. *Clauson*, 343 U.S. 306, 313 (1952)). The Framers therefore designed a system in which "preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission." *Lee*, 505 U.S. at 589; see also *Zorach*, 343 U.S. at 313 ("We sponsor an attitude on the part of government that * * * lets each [religion] flourish according to the zeal of its adherents and the appeal of its dogma.").

A legal-coercion-only test simply would not address these core concerns of the Establishment Clause. See *County of Allegheny* v. *ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 627-628 (1989) (O'Connor, J., concurring in part and concurring in the judgment) ("An Establishment Clause standard that prohibits only 'coercive' practices or overt efforts

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[3] Accord, *e.g.*, *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 860-861 (1995) (Thomas, J., concurring in the judgment); *Bowen* v. *Kendrick*, 487 U.S. 589, 607-608 (1988); *Edwards* v. *Aguillard*, 482 U.S. 578, 616 (1987) (Scalia, J., dissenting) ("governmental 'neutrality' toward religion is the preeminent goal of the First Amendment").

at government proselytization * * * would not * * * adequately protect the religious liberty or respect the religious diversity of the members of our pluralistic political community."); *id.* at 660-661 (Kennedy, J., concurring in part and dissenting in part) (recognizing that a "*direct* coercion" test would allow some unconstitutional "[s]ymbolic recognition" of a faith).

Indeed, this Court considered and rejected just such a narrow legal-coercion test in *Lee*, after detailed questioning of the petitioners' counsel about what that test would license.[4] When asked whether, under the test, a state legislature could pass a resolution naming a particular religion as the state religion, "like they might pass a resolution saying the bolo tie is the State necktie," counsel answered in the affirmative. Tr. of Oral Arg. at 13-14, *Lee* v. *Weisman*, 505 U.S. 577 (1992) (No. 90-1014). Counsel also stated that the test would not prohibit this Court from opening its sessions with "Jesus Christ save the United States and this Honorable Court" or the U.S. Mint from stamping "In Jesus Christ We Trust" on our money. *Id.* at 12-13. Nor, presumably, would the test bar "the permanent erection of a large Latin cross on the roof of city hall" or a public schoolhouse. *Allegheny*, 492 U.S. at 661 (Kennedy, J., concurring in part and dissenting in part). *Amici* do not believe that anyone seriously supposes the First Amendment to allow a country full of towns erecting monuments to their preferred faiths and denominations—and town halls consumed by heated debates over which to favor.

As Justice Scalia straightforwardly observed during the oral argument in *Lee*, a legal-coercion-only test

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[4] Counsel of record for the American Legion here, Mr. Carvin, was cocounsel for the petitioners in *Lee*.

"just [does not] comport[] with our tradition." Tr. of Oral Arg. at 12, *Lee* v. *Weisman*, 505 U.S. 577 (1992) (No. 90-1014).

b. A legal-coercion-only test would also violate the canons of constitutional interpretation.

There can be no doubt that the Free Exercise Clause prevents government from compelling participation in unwanted religious exercises; that is the very heart of the free-exercise guarantee. See, *e.g.*, *Abington Sch. Dist.* v. *Schempp*, 374 U.S. 203, 223 (1963) ("[I]t is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion.").

While there is certainly overlap in the prohibitions and protections of the Establishment and Free Exercise Clauses (see, *e.g.*, *Engel*, 370 U.S. at 430; *Board of Educ.* v. *Grumet*, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring in part and concurring in the judgment)), reading the Establishment Clause to bar *only* legal coercion would make it duplicative of the Free Exercise Clause (see *Lee*, 505 U.S. at 621 (Souter, J., concurring) ("[A] literal application of the coercion test would render the Establishment Clause a virtual nullity"); *Allegheny*, 492 U.S. at 628 (O'Connor, J., concurring in part and concurring in the judgment); *Schempp*, 374 U.S. at 223 ("The distinction between the two clauses is apparent—a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended."). It would thus impermissibly render the Establishment Clause mere surplusage. Cf. *District of Columbia* v. *Heller*, 554 U.S. 570, 643 (2008) ("It cannot be presumed that any clause in the constitution is intended to be without effect") (quoting *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 174 (1803)).

2. A test limited to considering practices at the time of ratification would be empty.

The attempt to make some version of the historical approach of *Marsh* v. *Chambers*, 463 U.S. 783 (1983), and *Town of Greece* v. *Galloway*, 572 U.S. 565 (2014), the only mode of permissible analysis provides no guidance for deciding most cases that arise under the Establishment Clause.

a. In *Marsh*, this Court upheld legislative prayer based primarily on congressional intent reflected in the "unique," "unambiguous" historical fact that the First Congress voted to hire legislative chaplains the same week that it approved the First Amendment. 463 U.S. at 787-788, 791-792. And in *Greece*, the Court upheld a town board's prayer practice as consistent with the specific tradition identified in *Marsh*. 572 U.S. at 577, 584. The Court explained in *Greece* that the Establishment Clause should be interpreted with "historical practices and understandings" in mind, not to posit that history is all that matters, but to illuminate the mandate of the Court's preceding sentence, which directs that "*Marsh* must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation." *Id.* at 576.

Thus, the Court recognized, bedrock antiestablishment principles barring denominational preferences and religious coercion retain their legal force (see *Greece*, 572 U.S. at 586, 589), whatever historical practice might have been (see *id.* at 576). For "no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it." *Marsh*, 463 U.S. at 790 (quoting *Walz*, 397 U.S. at 678).

b. The attempt to employ a historical approach as the exclusive test for official conduct under the Establishment Clause also makes little sense either historically or practically.

As an initial matter, the Establishment Clause was not applied to the states until after incorporation through the Fourteenth Amendment in 1943. See *Everson*, 330 U.S. at 8 (citing *Murdock* v. *Pennsylvania*, 319 U.S. 105, 108 (1943)). Accordingly, what states and local governments might have been doing during the founding era is "irrelevant." *Allegheny*, 492 U.S. at 670 n.7 (Kennedy, J., concurring in part and dissenting in part). Established state churches persisted decades after the Bill of Rights was ratified. See, *e.g.*, Mass. Const. amend. XI (disestablishment in 1833); Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 Nw. U. L. Rev. 1113, 1132 & nn.97-98 (1988). Yet this Court has never suggested that state churches are therefore constitutionally permissible.

Additionally, as far as *amici* have been able to discern, no crosses were being erected on the mostly nonexistent federal lands at the founding. Nor would the Framers have been thinking about states' doing so, because that doesn't appear to have been happening either. See, *e.g.*, *Trunk*, 629 F.3d at 1112-1114 (detailing historical rarity of crosses as war memorials). And nothing in the submissions of petitioners or their *amici* genuinely suggests otherwise.

More generally, "[t]here were only a few conflicts between law and religious practice in the founding era. Governments were small and the nation was overwhelmingly Protestant." Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. Ill. L. Rev. 839, 842 (2014). The Framers thus had no reason

to consider the many issues concerning government and religion today. To infer constitutionality from the failure to name as violations specific actions that the Framers likely never imagined government would presume to undertake would license official conduct that this Court has consistently and unequivocally held to be barred.

Most obviously, public schools were "virtually nonexistent" at the founding. *Wallace* v. *Jaffree*, 472 U.S. 38, 80 (1985) (O'Connor, J., concurring in the judgment). They arose well after the First Amendment was ratified. See, *e.g.*, 1 *A Cyclopedia of Education* 418 (Paul Monroe ed. 1915) (first public high school in America established in Boston in 1821). And they were slow to proliferate. See *Schempp*, 374 U.S. at 238 n.7 ("[T]he burgeoning public school systems did not immediately supplant the old sectarian and private institutions; Alexis de Tocqueville, for example, remarked after his tour of the Eastern States in 1831 that '[a]lmost all education is entrusted to the clergy.'" (quoting 1 Alexis de Tocqueville, *Democracy in America* 309 n.4 (Bradley ed. 1945))).

"Since there then existed few [or no] government-run schools, it is unlikely that the persons who drafted the First Amendment, or the state legislators who ratified it, anticipated the problems of interaction of church and state in the public schools." See *Lee*, 505 U.S. at 635 (Scalia, J., dissenting). Yet this Court has long and consistently recognized that official prayer, proselytization, and religious indoctrination in public schools are forbidden. See, *e.g.*, *Edwards*, 482 U.S. 578 (1987) (holding unconstitutional state law prohibiting teaching of evolution unless accompanied by lessons on creationism); *Wallace*, 472 U.S. 38 (holding unconstitutional state laws promoting teacher-led prayer);

Epperson, 393 U.S. 97 (holding unconstitutional state law prohibiting teaching of evolution); *Schempp*, 374 U.S. 203 (holding unconstitutional state law requiring public schools to begin each day with prayer and Bible verses); *Engel*, 370 U.S. 421 (holding unconstitutional school district's requirement to open school day with prayers).

And the modern administrative state is, of course, modern. See, *e.g.*, *Hosanna-Tabor*, 565 U.S. at 185 (acknowledging "absence of government employment regulation generally" in historical record); cf. *Allegheny*, 492 U.S. at 657-658 (Kennedy, J., concurring in part and dissenting in part) (noting that expansion of administrative state in twentieth century has complicated issues of law and religion). Not only were federal and state offices uninvolved during the early years in raising religious monuments, but they did not do much else either. Yet this Court has never held the Establishment Clause inapplicable to administrative agencies. Quite the contrary. See, *e.g.*, *Witters* v. *Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986) (state agency); *Walz*, 397 U.S. 664 (local tax commission); *Flast*, 392 U.S. 83 (federal administrative action).

Concluding from early governmental silence and inaction that the Establishment Clause permits official promotion of religion stands the logic of *Marsh* and *Greece* on its head: It creates a constitutional permission slip to promote religion and a favored faith based not on affirmative congressional action contemporaneous with adoption of the First Amendment, but on the negative inference that because the Framers did not encounter particular forms of religious favoritism and promotion that exist today, the practices are therefore permitted.

3. The absence of past challenges to an act of religious favoritism does not alone show lack of cognizable harm.

Finally, some suggest that official promotion of a particular faith or of religion generally should earn constitutional license if the conduct—or, perhaps, some other example of that conduct elsewhere—was of long duration without previously sparking lawsuits or other substantial public outcry.

To be sure, avoidance of divisiveness along religious lines is a central concern of the Establishment Clause. See Section A, *supra*. But to assume that the absence of open civil strife means that there is no constitutionally cognizable interest at stake is to ignore the real, substantial threats and harms that citizens face when they stand against official religious favoritism and promotion.

That no one at an earlier time may have protested or sued over the counties' huge Latin cross here, or certain other cross displays, is entirely understandable—not because duration proves that no one genuinely cares, but because the dangers of speaking up suppress dissent. "Suing a State over religion puts nothing in a plaintiff's pocket and can take a great deal out, and even with volunteer litigators to supply time and energy, the risk of social ostracism can be powerfully deterrent." *Van Orden*, 545 U.S. at 747 (Souter, J., dissenting).

This Court's own cases illustrate the point:

- In *McCollum*, Vashti McCollum received hundreds of pieces of hate mail, her house was vandalized, and her son was physically attacked because of her challenge to religious in-

struction in the child's public school. See Robert S. Alley, *Without a Prayer: Religious Expression in Public Schools* 86-87 (1996).

- In *Schempp*, children of a plaintiff were beaten and their home was firebombed over a challenge to official prayer and Bible reading in a public school. Alley, *supra*, at 98.
- The "emotional scars" suffered by the plaintiff who challenged the crèche in *Lynch* went so deep that he resolved never again to "take a stand for a controversial belief that clashed with mainstream public opinion." Wayne R. Swanson, *The Christ Child Goes to Court* 21 (1990).
- In *Santa Fe*, the district court allowed the plaintiffs to proceed anonymously in their challenge to official prayer at public-school football games after they received threats and their children were intimidated and assaulted; and the court took added measures to safeguard the children when school officials and others tried to ascertain the Doe plaintiffs' identities. Tr. of Oral Arg. at 29-30, *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290 (2000) (No. 99-62). Even non-plaintiff parents who had voiced support for the challenge reportedly removed their children from school out of fear for their safety. *Id.* at 30.

In the lower courts, examples are legion:

- When Kay Staley sued over a Bible monument at a Houston courthouse, she received dozens of harassing communications and multiple

graphic threats of sexual violence. See Appellant's Br. at 57, *Staley* v. *Harris County*, 461 F.3d 504 (5th Cir. 2006) (No. 04-20667).

- When other students at a New Jersey high school mistakenly assumed that the two Jewish girls on the cheerleading squad had complained about coach-led prayers, they were bullied and harassed both in person and through voluminous anti-Semitic and sexually graphic threats on the school's electronic bulletin board. See *Borden* v. *School Dist.*, 523 F.3d 153, 184 (3d Cir. 2008) (McKee, J., concurring).
- When Darla Wynne challenged a South Carolina town's discriminatory prayer practice in *Wynne* v. *Town of Great Falls*, 376 F.3d 292 (4th Cir. 2004), she was victim to home invasions and her pets were beaten and murdered. *S.C. Prayer Plaintiff Faces Wrath of Community Over Lawsuit*, Church & State (Nov. 2004), http://tinyurl.com/zka3n6r. In one incident, her home was broken into and her pet parrot beheaded, its body left with a note warning, "You're next!" *Ibid.*
- When, in *Glassroth* v. *Moore*, 335 F.3d 1282 (11th Cir. 2003), Melinda Maddox challenged then-Chief Justice Roy Moore's Ten Commandments monument in the Alabama Judicial Building, she received death threats and had her law practice boycotted, her home, law office, and car vandalized, and the windows of her home shot out. Rob Boston, *Plucky Lindy*, Church & State (Apr. 2004), http://tinyurl.com/h47gja2.

- At least two plaintiffs in *Kitzmiller* v. *Dover Area School District*, 400 F. Supp. 2d 707 (M.D. Pa. 2005), received death threats (including one to a plaintiff's daughter) after challenging creationism in public-school science classes. See Lauri Lebo, *The Devil in Dover* 213-214 (2008). So did the district judge and his family. See, *e.g.*, Ron Knox, *Judge in Dover I.D. Case Touts Legal Independence*, Lawrence Journal-World (Sept. 27, 2006), http://tinyurl.com/r6yol.

That citizens justifiably fear retaliation, bite their tongues, and teach their children that they had better go along to get along should not be taken to mean that no one is disfavored, denigrated, or otherwise hurt by official religious favoritism and promotion. The Religion Clauses were designed instead to prevent the very religious oppression that also silences dissent. See *Everson*, 330 U.S. at 9-13.

* * *

"The very purpose of [the] Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *Barnette*, 319 U.S. at 638. Thus, "we do not count heads before enforcing the First Amendment." *McCreary*, 545 U.S. at 884 (O'Connor, J., concurring). And we do not let a heckler's veto silence assertions of constitutional rights, even when the hecklers are in the majority. Cf. *Lee*, 505 U.S. at 617-618 (Souter, J., concurring) (Establishment Clause does not countenance "official preference for the faith with the most votes"). Our fundamental guarantees for religious freedom require more.

CONCLUSION

Regardless of the counties' intent, the Bladensburg Cross sends the divisive and hurtful message that non-Christians are second-class citizens whose sacrifices for our Nation do not count. And the requests to scrap the Framers' plan to ensure religious freedom for all puts religious minorities, and all of us, at risk. As Justice O'Connor put it:

> At a time when we see around the world the violent consequences of the assumption of religious authority by government, Americans may count themselves fortunate: Our regard for constitutional boundaries has protected us from similar travails, while allowing private religious exercise to flourish. * * * Those who would renegotiate the boundaries between church and state must therefore answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?

McCreary, 545 U.S. at 882 (O'Connor, J., concurring).

The judgment should be affirmed.

Respectfully submitted.

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JANUARY 2019

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APPENDIX

APPENDIX OF *AMICI CURIAE*

Americans United for Separation of Church and State

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization that is committed to preserving the constitutional principles of religious freedom and the separation of religion and government. Americans United represents more than 125,000 members and supporters nationwide. Since its founding in 1947, Americans United has participated as a party, as counsel, or as an *amicus curiae* in the leading church–state cases decided by this Court and by the federal courts of appeals throughout the country. Consistent with our support for the separation of religion and government, Americans United has long fought to uphold the guarantees of the First Amendment that government must not favor, promote, or disfavor any faith or its adherents.

American Civil Liberties Union and ACLU of Maryland

The American Civil Liberties Union is a nationwide, nonprofit, nonpartisan organization with more than 1.5 million members dedicated to defending the principles of liberty and equality embodied in the Constitution and the nation's civil-rights laws. The ACLU of Maryland is a state affiliate of the national ACLU. For nearly a century, the ACLU has been at the forefront of efforts to safeguard the fundamental right to religious liberty, including the core constitutional protections against governmental religious favoritism.

Anti-Defamation League

Anti-Defamation League is a leading anti-hate organization. Founded in 1913 in response to an escalating climate of anti-Semitism and bigotry, its timeless mission is to stop the defamation of the Jewish people and to secure justice and fair treatment for all. Today, ADL continues to fight all forms of hate with the same vigor and passion. Among ADL's core beliefs is strict adherence to the separation of church and state. ADL emphatically rejects the notion that the separation principle is inimical to religion, and holds, to the contrary, that a high wall of separation is essential to the continued flourishing of religious practice and belief in America and to the protection of minority religions and their adherents.

Hadassah, the Women's Zionist Organization of America, Inc.

Hadassah, the Women's Zionist Organization of America, Inc., founded in 1912, is the largest Jewish and women's membership organization in the United States, with over 300,000 Members, Associates and supporters nationwide. While traditionally known for its role in developing and supporting healthcare and other initiatives in Israel, Hadassah has a proud history of protecting the rights of women and the Jewish community in the United States. Hadassah is a strong supporter of the strict separation of church and state, as it is critical to preserving the religious liberties of all Americans and especially of religious minorities.

Hindu American Foundation

The Hindu American Foundation is a nonprofit advocacy organization for the Hindu American community. Founded in 2003, HAF's work addresses a range of issues—from the portrayal of Hinduism in K-12 textbooks, to civil and human rights, to addressing contemporary problems such as environmental protection and interreligious conflict—by applying Hindu philosophy. The Foundation educates the public about Hinduism, speaks out about issues affecting Hindus worldwide, and builds bridges with institutions and individuals whose work aligns with HAF's objectives. HAF's three areas of focus are education, policy, and community. Since its inception, HAF has made church–state advocacy one of its main areas of interest. From issues of religious accommodation and religious discrimination to defending the fundamental constitutional rights of free exercise and the separation of church and state, HAF has educated Americans at large and the courts about the impact of such issues on Hindu Americans, as well as about various aspects of Hindu belief and practice in the context of religious liberty.

Interfaith Alliance Foundation

Interfaith Alliance Foundation is a 501(c)(3) nonprofit organization committed to advancing religious freedom for all Americans. Founded in 1994, Interfaith Alliance Foundation champions individual rights, promotes policies that strengthen the boundary between religion and government, and unites diverse voices to challenge extremism. Our membership reflects the rich religious and cultural diversity of the United States, adhering to over 75 faith traditions as well as no faith tradition.

Jewish Social Policy Action Network

The Jewish Social Policy Action Network is an organization of American Jews dedicated to protecting the constitutional liberties and civil rights of Jews, other minorities, and the vulnerable in our society. For most of the last two thousand years, Jews lived in countries in which religion and state were one and minority faiths were constantly reminded of their outsider status by prominent governmental displays of religious symbols. In Europe, especially, Jews and minority Christian faith communities faced discrimination, persecution, expulsion, or worse. Those who emigrated to America found that here one could be both a Jew and an American, a Catholic and an American, or an atheist and an American. JSPAN believes that the gift of church–state separation is essential to all our fundamental freedoms and therefore that great care must be taken to prevent any erosion of the Establishment Clause. Critical to this effort is that members of minority faiths not be made to feel like second-class citizens by being subjected to government-sponsored displays of Christian religious symbols. Although many Christians also find it offensive when their sacred symbol is co-opted by government, for Jews and other minorities—even if they believe that not every use of a cross is intended as a specific endorsement of Christianity—official use of such symbols sends a viscerally divisive message that their faith group does not enjoy the same privileged status.

National Council of Jewish Women

The National Council of Jewish Women is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by

Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Principles states that "Religious liberty and the separation of religion and state are constitutional principles that must be protected and preserved in order to maintain democratic society." Consistent with our Principles and Resolutions, NCJW joins this brief.

People For the American Way Foundation

People For the American Way Foundation is a nonpartisan civic organization established to promote and protect civil and constitutional rights, including religious liberty, as well as American values like equality and opportunity for all. Founded in 1981 by a group of civic, educational, and religious leaders, PFAWF now has hundreds of thousands of members nationwide. Over its history, PFAWF has conducted extensive education, outreach, litigation, and other activities to promote these values. PFAWF strongly supports the principles that both the Free Exercise and Establishment Clauses of the First Amendment protect freedom of religion, and that governmental action that promotes a particular religion, as in this case, harms religious liberty for all and violates the First Amendment.

Reconstructing Judaism

Reconstructing Judaism is the central organization of the Reconstructionist movement. We train the next generation of rabbis, support and uplift congregations and *havurot*, and foster emerging expressions of Jewish life—helping to shape what it means to be Jewish today and to imagine the Jewish future. There

are over 100 Reconstructionist communities in the United States committed to Jewish learning, ethics, and social justice. Reconstructing Judaism believes in the importance of the separation of church and state to ensure religious freedom and equal rights and equal dignity for all.

Reconstructionist Rabbinical Association

The Reconstructionist Rabbinical Association is a 501(c)(3) organization that serves as the professional association of 340 Reconstructionist rabbis, the rabbinic voice of the Reconstructionist movement, and a Reconstructionist Jewish voice in the public sphere. Based on our understanding of Jewish teachings that every human being is created in the divine image, we have long advocated for public policies of inclusion, antidiscrimination, and equality.

Union for Reform Judaism, Women of Reform Judaism, and Men of Reform Judaism

The Union for Reform Judaism, whose 900 congregations across North America include 1.5 million Reform Jews; Women of Reform Judaism, which represents more than 65,000 women in nearly 500 women's groups in North America and around the world; and Men of Reform Judaism come to this issue out of our long-standing commitment to the principle of separation of church and state, believing that the First Amendment to the Constitution is the bulwark of religious freedom and interfaith amity. Religious freedom and its necessary corollary, the separation of church and state, have lifted American Jewry as well as other religious minorities, providing more protections, rights, and opportunities than have been known

anywhere else throughout history. Government sponsorship of religious symbols threatens the principle of separation of church and state, which is indispensable for preserving that unique blessing of American democracy—religious liberty.